No. 3427

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PABST BREWING COMPANY,
a Corporation,
Plaintiff in Error

vs

E. CLEMENS HORST COMPANY,
a Corporation,
Defendant in Error.

Reply of Defendant in Error to Oral Argument of Henry W. Stark and Frank H. Powers for Plaintiff in Error

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ANDERSON PRINTING CO. SACRAMENTO, CALIF.

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REPLY OF DEFENDANT IN ERROR TO ORAL ARGUMENT OF HENRY W. STARK AND FRANK H. POWERS FOR PLAINTIFF IN ERROR.

Permission was given to the counsel for plaintiff in error to print their oral argument and permission was given us to reply. In reply to their oral argument we submit:

I.

In our brief filed prior to the oral argument we showed that the plaintiff in error did not present any finding to the Court below nor ask the Court to adjudge that the evidence was insufficient to support any finding and that it did not secure any ruling

thereon nor take any exception to any ruling or finding. We called the attention of the Court to some of the cases showing the rule to be universal in the Federal Courts that under such circumstances the Appellate Court cannot review a finding. The Courts are forbidden by the Act of Congress to do this.

Among other cases, we cited one from this Court where this principle was applied.

> *Danberg Land & Livestock Co.* v. *Day*, 247 Fed. 477.

In that case the opinion was rendered by Mr. Justice Gilbert who said:

> "At the close of the testimony there was no request by the plaintiff in error for a finding in its favor on the issues and by no motion or request did it present to the trial Court the question of law whether there was substantial evidence to sustain findings for the defendant. The sufficiency of the evidence to support the findings, therefore, is not open to review in this Court."
>
> *Danberg Etc. Co.* v. *Day*, 247 Fed. 477.

Among the cases cited by this Court is *Dunsmuir* v. *Scott*, 217 Fed. 200, where it was said:

> "The question whether or not at the close of the trial, there is substantial evidence to sustain a finding in favor of one of the parties to the action is a question of law which arises in the progress of the trial. Where the trial is before a jury that question is reviewable on exception to a ruling upon a request for a peremp-

ber, 1912, at Eastern prices where the market price was the same as at Milwaukee as established by the evidence at prices that ranged from 14½ cents per pound to 18 cents per pound. (Record pp. 67-68.) The average of these market prices was 15.7 cents per pound.

(c) *By inferences from undisputed facts.*

It was established by evidence that Oregon hops are better or at least as good as Cosumnes hops and that Oregon hops sell for a greater price or at least for as great a price as Cosumnes hops.

M. D. Wormser one of witnesses for plaintiff in error says that the relative price of Oregon hops and Cosumnes hops was about the same. (Record p. 190.)

Another witness G. G. Schumacher testified that Sonoma hops sold higher than Cosumnes and that Sonomas ranked with Oregons. (Record p. 209.)

Another witness Murphy testified that Cosumnes are usually a cent below Sonomas or about the same. (Record p. 194.)

E. C. Horst says that Oregons and Sonomas are a higher grade than Cosumnes. (Record p. 108.)

If Oregon hops are a better grade than Cosumnes hops, or at least of an equal grade, and sell at a better price, or at least at an equal price, it is evident if we can know the price of Oregon hops at any given time and place we will know approximately the price of Cosumnes hops at such time and place or at least will know that the price for Cosumnes hops is no higher than that of Oregon hops.

It was uncontroverted that the price of choice

Oregon hops in November, 1912, was ten to twelve cents a pound and purchases were made at those prices. (Record p. 88.)

It follows therefore, as a conclusion that the price of Cosumnes hops cannot be greater than the price found by the Court, that is: 16 cents a pound at Milwaukee.

III.

With reference to the ability of the defendant in error to deliver 2000 bales of hops the evidence is ample.

E. C. Horst who was the active manager of the company defendant in error, and familiar with his own business testified that on November 4, 1912, the company had on hand over 3000 bales and gave their location. (Record p. 99, p. 78, pp. 80-81, p. 55.)

He certainly had the knowledge of his own affairs. He testified of his own knowledge.

Of the hops that the defendant in error had on hand 1586 bales were on the Pacific Coast. Other hops making a total of 3062 bales were in Eastern warehouses consigned to the defendant in error and in his possession and control. The plaintiff in error could have had any time its contracted 2000 bales out of these 3000 odd bales. (Record pp. 79, 84, 86.)

Witness Ernest Lange testified that in November, 1912, the defendant in error had 3062 bales of Cosumnes hops on hand. His testimony is:

> "Some were on the Cosumnes ranch, some were in Chicago, some at New York, some were en route East and some at Milwaukee. In Milwau-

tory instruction for a verdict. Where the trial is before the Court, it is reviewable upon a motion which presents that issue of law to the Court for its determination at or before the end of the trial. In the case at bar there was no such motion and no request for a special finding. We are limited, therefore, to a review of the rulings of the Court to which exceptions were reserved during the progress of the trial."

Dunsmuir v. *Scott,* 217 Fed. 200.

In another case decided in this Court, it is said by Judge Gilbert:

"The burden of the argument of counsel for the plaintiff in error is that the evidence overwhelmingly established the fact that Irwin was not a steel man, as he was classified in the policy, and as alleged in the complaint, but was a common laborer, and it ignores the effect of the judgment of the Court below, which must be taken as conclusively establishing the contrary, for there was no motion in the Court below for a ruling or judgment on that question at the close of the trial, nor does any assignment of error challenge the findings of the Court on the evidence. When an action is tried before a jury, their verdict is not subject to review unless there is absence of substantial evidence to sustain it, and even then it is not reviewable, unless a request has been made for peremptory instruction, and an exception is taken to the ruling of the Court. When a jury is waived and the cause is tried by the Court, the general finding of the Court for one or the other of the parties stands as the verdict of a jury, and may not be reviewed in Appellate Court, unless the lack of evidence to sustain the finding has been suggested by a request for a ruling therein, or a motion for judgment, or some motion to present to the Court the

issue of law so involved before the close of the trial."

Pennsylvania Casualty Co. v. *Whitemay*, 210 Fed. 782 citing numerous cases.

It would be useless to multiply these authorities.

Plaintiff in error asks the Court to reverse its decisions and to disregard the decisions of other Federal Appellate Courts. In support of this request, its counsel call attention to certain cases which have no application.

This is not a case where something was done in the Court below and there was a failure to record an exception. The act to which an exception might have been taken was not done at all. The rule announced by the Courts has no exception.

II.

The finding of the Court as to the difference between the market price and the contract price is sustained:

(a) *By the testimony of experts.*

Witness E. C. Horst testified that the market value of choice Cosumnes hops in Milwaukee in November, 1912, was 12 cents per pound. (Record pp. 49-50.)

F. W. George testified that the market value was 15½ cents to 16 cents per pound. (Record p. 94.)

Flood V. Flint testified that the market price was about 14 cents. (Record p. 272.)

(b) *By sales.*

Actual sales of these hops were made in Novem-

> kee they were at Merchants Storage and Transfers Company's Warehouse. In New York they were at the North River warehouse and the Terminal warehouse. Generally hops of that sort were sent to the order of E. Clemens Horst Company or notify E. Clemens Horst Company. Those in Chicago were at Sibley's Warehouse." (Record p. 117.)

The plaintiff in error criticizes the testimony of Mr. Horst. Such criticism was a matter to be addressed solely to the Court below. But if Mr. Horst's evidence were entirely eliminated the finding is supported by the evidence of Mr. Lange.

It is useless to argue which party below had the most evidence or the preponderance of evidence, on any certain issue because as said by Judge Ross where certain allegations were negatived by the trial Court:

> "Under the well established rule such findings are conclusive upon us, however, convincing we might otherwise consider the argument of the plaintiff in error that upon the evidence such findings should have been otherwise."
>
> "*National Surety Co.* v. *Globe Grain and Milling Co.* 256 Fed. 602.

The judgment should be affirmed.

Respectfully submitted,

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